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No. 98-843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF MARYLAND,
Petitioner,

v.

JOHNNY WALKER,
Respondent.

On Petition For Writ of Certiorari To The Court of Special Appeals of Maryland

BRIEF FOR THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE*

The National Center for Missing and Exploited Children (NCMEC) is a congressionally mandated, District of Columbia not-for-profit corporation organized to act as the national missing child clearinghouse, to assist law enforcement in locating and recovering missing children, and dedicated to raising awareness about child sexual exploitation. Since 1984, NCMEC has been committed to ending child abduction and child sexual victimization by providing technical assistance, training and support to law enforcement, prosecutors, direct-service providers, community supervision, courts, legislators, educators, researchers, families, parents and victims. See generally, 42 U.S.C. §§ 5771 – 5780.

NCMEC has an interest in the present case because it involves the overturned conviction of a defendant who raped and sodomized two young girls entrusted to his care over an 11-year period of time. Not only is NCMEC interested in seeing justice done in this case, but NCMEC is interested in preventing re-victimization that occurs when child victims are called upon to testify in the criminal trials of their abusers.

The conviction in this case was overturned based on the appellate court's misapplication of the constitutional standard that applies to courtroom closures. Settling the standard for partial closure of and/or exclusion of certain observers from public proceedings is important to ensure that victim witnesses can exercise the right to testify

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*This brief is filed with the written consent of both parties pursuant to Rule 37(2)(a). Counsel for amicus curiae authored the brief in whole and no other person or entity made a monetary contribution to the preparation or submission of the brief.

truthfully with a minimum exposure to trauma. Therefore, NCMEC supports the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Child sexual molestation can be very difficult to prosecute because often the only evidence is the testimony of the child victim.[1] Child victims can be reluctant to testify in open court, especially in the presence of their abusers.[2] In this case, the child victims testified freely in front of their abuser but expressed fear of their abuser's family. Upon the prosecutor's proffer that the young witnesses felt threatened, the trial court properly weighed the competing interests of justice and excluded the family members in question during the victims' testimony.

Because the Maryland Court of Special Appeals incorrectly applied the constitutional standard governing total court closures, as opposed to partial closures, and overturned the conviction based on the defendant's Sixth Amendment right to a public trial, this Court should articulate standards for partial closures.

NCMEC has consistently urged state legislatures and courts to adopt constitutional practices that minimize the trauma to the child victims and encourage their open and truthful testimony while protecting the rights of the

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[1] Mario Gaboury & Roslyn Myers, *Statutory Protections Shield Child Victims Who Are Called to Testify*, Sexual Assault Report, Sept./Oct. 1998, at 3.

[2] Debra Whitcomb, *When the Victim is a Child* 103 (1992).

accused.[3] NCMEC urges this Court to grant the Petition for Writ of Certiorari to address the constitutional standards that should apply to the exclusion of certain members of the public for limited purposes during a criminal trial. NCMEC hereby adopts and incorporates the facts and arguments presented by the Petitioner. In the interest of child victims, NCMEC augments such arguments with two other reasons why the Court should consider the question presented.

First, the issue of partial closure should be addressed because the presence of child victim witnesses in criminal trials will likely increase, and the likelihood that trial courts will address prosecution requests for limited closure of proceedings will also increase. Such partial closures do not run afoul of the Sixth Amendment right to a public trial. In fact, the Court has recognized child victims of sex crimes as among those whose interests compete with a defendant's interest in a public trial. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 614 (1982). It is critical that child victim witnesses be given the opportunity to testify in a safe environment where (1) they feel comfortable enough to testify about the abuse they suffered, and (2) the likelihood of further victimization is diminished.

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[3] National Center for Missing & Exploited Children, *A Report Card to the Nation: Missing and Exploited Children 1984-1994* at 15 (September 1994); A *Report to the Nation: Missing and Exploited Children* at 18-19 (January 1997); Jay C. Howell, *Selected State Legislation: A Guide for Effective State Laws to Protect Children* at 75-96 (Judith Drazen Schretter & Donna Castle Aspell, eds., May 1993) (1985).

Second, many states, including Maryland, have codified provisions for child victim witnesses that protect them during the criminal trial of their abusers. This includes videotaped testimony, courtroom privacy screens, closed circuit television, and partial closures. Partial closure, or exclusion of certain members of the public, does not deprive the accused of the right to a public trial even when there has been no case-by-case analysis required for total closures. To apply the standard governing total closures in cases of partial closure provides no greater measure of protection to the accused and is antithetical to the protection of child victim witnesses.

ARGUMENT

A. The Court Should Articulate The Proper Standard for Partial Closure of Criminal Proceedings under the Sixth Amendment to Minimize Further Victimization and Maximize Opportunity for Truthful Testimony by Child Victim Witnesses.

(1) The Sixth Amendment Right to a Public Trial is Not Abridged by a Partial Closure.

A criminal defendant's right to a public trial is personal to the defendant and constitutionally protected under the Sixth Amendment. *Gannett Co. v. De Pasquale*, 443 U.S. 368, 380 (1979) (while the press and others have a First Amendment right to attend a criminal trial, the right to a public forum is held by the defendant for his benefit). A defendant's right to a public trial under the Sixth Amendment guarantee is closely linked to the First Amendment because "[p]ublic scrutiny of a criminal trial

enhances the quality and safeguards the integrity of the factfinding process" so that a criminal defendant is more likely to have a fair trial. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606. Not only does a public trial serve to ensure fairness that might be abridged by secret proceedings, the interests of justice are further served because "a public trial encourages witnesses to come forward and discourages perjury." *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

The right to a public trial extends to proceedings attendant to a trial, such as jury selection voir dire and suppression hearings. *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 – 511 (1984); *Waller v. Georgia*, 467 U.S. at 46. While the right to a public trial is expansive, it is not absolute. When a "compelling" or "overriding" interest is advanced, the trial court may order closure as long as it "is essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise Co. v. Superior Court*, 464 U.S. at 510. The interest must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* In order to meet the constitutional requirements under the Sixth Amendment, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." 467 U.S. at 48.

The Court has consistently held that cases of sex crimes against children are of the type where compelling or overriding interests may be advanced. *Id.* at 512 (stating

that the rape of a teenage girl may give rise to legitimate privacy interests of jurors who experienced similar assaults); *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 607 (stating that "protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner" are compelling).[4]

When a compelling interest such as the physical and psychological well being of a child sex abuse victim is at issue, mandatory and/or total closure of the courtroom is still not necessarily justified. *Id.* at 608. The trial court is required to "determine on a case-by-case basis whether the State's legitimate concern for the well being of the minor victim necessitates closure." *Id.* Such a case-by-case analysis to justify closure requires the court to consider the nature of the crime, the age, psychological maturity, understanding and wishes of the victim, and the interests of the parents and relatives. *Id.*

The contours of the Sixth Amendment right to a public trial have been defined in terms of mandatory or total closure to all spectators other than the parties and necessary court personnel. The Court has explained the constitutional underpinnings for ensuring a public trial and delineated the instances where the right gives way to another compelling interest. In order to justify a complete closure of the courtroom that renders the trial essentially

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[4] See also, *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 614 (Burger, C.J., and Rehnquist, J., dissenting) (arguing that the majority opinion was actually in discord with "clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors").

non-public, the Court has announced the standards for the inquiry and findings the trial court must effect. In the case on petition to the Court, there was neither total nor mandatory closure of the proceeding that would normally trigger the stringent rules developed under *Press Enterprise Co.* and *Waller.*

In cases such as this, the defendant's constitutional rights are not impaired as they may be when there is total or mandatory closure. In cases of partial closure, the fairness of the trial is maintained despite the limited exclusion of certain spectators. The proceeding is not rendered secret by limited exclusions. The integrity of the trial court's ability to adduce facts upon which the jury can rely and the defendant's right to cross-examine are preserved. In fact, in cases where child victim witnesses are called to testify, partial closure will help ensure that victim witnesses will come forward and testify truthfully. By its definition, a partially closed trial is narrowly tailored to exclude only a particular person or group of persons who present a threat to the victim witness's ability to testify openly and truthfully. Because the types of closures have widely varying degrees of impact on a defendant's Sixth Amendment rights, the Court should address what standard should apply to a partial closure, as opposed to a complete closure.

(2) Courts Have a Duty to Protect Child Victims.

Although courts and legislatures are responding to child victim issues more than ever, the justice system still has not adequately evolved to meet the special needs of child

victims, especially victims of sexual molestation.[5] Child victims deserve the greatest measure of protection available without impairing the right of the accused to have a constitutional trial. Courts and researchers have consistently recognized that a trial or other public proceeding is an environment that is intimidating to child victim witnesses. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608, 615-617 (Burger, C.J., and Rehnquist, J., dissenting).[6] In child sex abuse cases, not only has the child suffered the actual sexual victimization, but he may also be subjected to further trauma by participation in the criminal justice system when he testifies, is cross-

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[5] Nancy Walker Perry & Lawrence S. Wrightsman, *The Child Witness: Legal Issues and Dilemmas* 135-136 (1991)(describing the various responses at the trial court level to make children more comfortable in an intimidating surrounding).

[6] See generally, Jennifer Marie Batterman-Faunce & Gail S. Goodman, *Effects of Context on the Accuracy and Suggestibility of Child Witnesses, in Child Victims, Child Witnesses: Understanding and Improving Testimony* (Gail S. Goodman & Bette L. Bottoms, eds., 1993)(explaining the nature and effect of courtroom intimidation and trauma on child victim witnesses and suggestions for improving the legal response to their needs); and Rhona I. Flin, *Hearing and Testing Children's Evidence, in Child Victims, Child Witnesses: Understanding and Improving Testimony* 282-296 (describing the sources of stress on the child victim as studied in the British legal systems).

examined, and must face the defendant.[7] This added dimension of victim suffering is a relevant factor for the Court to consider when deciding whether a separate standard should apply to partial closures. Because truthful testimony is essential to a fair trial, every effort within constitutional and ethical boundaries should be made to accommodate the child victim who testifies in open court.

B. Because the Testimony of Child Victim Witnesses Is Often the Strongest Evidence in a Child Sexual Exploitation Trial, Constitutionally Sound Choices Should Be Available to the Trial Court and to the Witness.

Child advocates and jurists understand that while most children feel threatened and intimated by testifying and reliving their victimization, not all children respond in the same way to a particular type of accommodation that is offered to them.[8] Most states have enacted legislation intended to protect children from further victimization by permitting testimony by videotape and closed circuit television. At least 15 states and the federal courts permit

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[7] Perry & Wrightsman, *supra*, at 136 (citing Gail S. Goodman, et al., Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims 71 (1990)).

[8] *Id.* at 136-137 (citing Gail S. Goodman, et al., *Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims* 83, whose "comprehensive study of the emotional reactions of child sexual assault victims, 65 percent" of the children studied experienced a range of harm from "'some distress'" to being "'very distressed'").

some type of statutory exclusion of spectators during the live testimony of a child victim. (See Appendix A)

The statutes permitting closure are, of course, not as expansive as the Massachusetts mandatory closure statute in question in *Globe Newspaper Co. v. Superior Court*. 457 U.S. at 601-602. In response to *Globe Newspaper Co.*, most of the closure statutes now contain language substantially similar to the test established by the Court. It is significant that legislatures have identified the need to respond to the plight of young children who are called to testify against their abusers. While it may be traumatic, it is usually necessary for the victim to tell the jury about the abuse he endured. While there is no way to fully protect child victim witnesses from greater harm, creating choices for the court and the victims to consider will help to curb further harm to the victim witness and encourage open and truthful testimony.

In this case, the child victims were willing and able to testify in front of their abuser. The trial court found that live witness testimony was preferable to closed circuit testimony. The court was presented with a proffer that the children, understandably, felt intimidated by the defendant's family members in the courtroom. However, it is irrelevant whether there were actual threats made. Since the witnesses perceived threats that could taint their testimony, the spectators were properly excluded for the limited duration of the victim's testimony. One of the articulated interests to be protected under the Sixth Amendment is truthful testimony, that was effected by exclusion of the courtroom spectators the witnesses perceived as threatening. *Waller v. Georgia*, 467 U.S. at 46.

Spectators have been properly excluded from courtrooms where there was a threat of harm from the spectators or where a witness had been threatened. See, e.g., *United States v. DeLuca*, 137 F.3d 24, 33-34 (1st Cir. 1998)(recognizing that while there is no settled law on partial closures, held that the stringent rules of the *Waller* test did not apply in partial closure contexts), *cert. denied*, 119 S. Ct. 174 (1998); *United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979)(holding that for partial closure, a fact-finding hearing was unnecessary where an adequate affidavit supplied by the case agent supported the allegation that the witness had been receiving threats). While a partial closure is still a serious matter that may have an effect on the defendant's trial, the stringent rules that apply to complete closure are mitigated by the limited scope of a partial closure. Where the witness has been threatened or perceives a threat, the evidence adduced at trial risks taint.

When a child has been sexually abused and assaulted, especially for a protracted period of time, the only evidence of the crime(s) may be his testimony. Whether the threat to the child by certain spectators is real or perceived, the interests of justice are served by reasonable and constitutionally sound rules to permit partial closure, among other choices, to protect the child victim witness.

CONCLUSION

Because partial closure of a courtroom during a criminal trial is compatible with the Sixth Amendment; and, because exclusion of certain spectators may be necessary to ensure protection of, and truthful testimony from, child victims of sexual abuse; and, because the

stringent rules triggered to ensure constitutional protections that inure to the accused are inapplicable to partial closures, the Court should grant the Petition for Writ of Certiorari and rule on the standards that apply to partial closure.

Respectfully submitted,

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APPENDIX

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APPENDIX A:

Compilation of statutes permitting courtroom closure for protection of child victim witnesses 1a

APPENDIX A

At least fifteen states and the federal government have provided for courtroom closure procedures. The following highlights the elements of each statute.

FEDERAL PROVISIONS

- Whenever a child testifies
- Court may order exclusion of all persons not having a direct interest in the case, including the media
- Court may so order after a determination on the record that the child would suffer substantial harm or not be able to effectively communicate if he were required to testify in open court
- The order shall be narrowly tailored to serve the government's compelling interest. 18 U.S.C. § 3509(e)

STATE PROVISIONS

California

- Defendant must be charged with sex offense
- Child must be under 16 years of age
- Prosecutor must move to have the proceeding closed to protect the reputation of the child
- Court must conduct a hearing and consider the following factors: nature and seriousness of offense, age of child, extent to which the size of the community precludes victim anonymity, likelihood of public disgrace due to victim status, whether there is a substantial probability that witness identity would be disclosed, whether there is a substantial probability that disclosure of identity would harm witness, whether the witness has already made public disclosure, and any other factor the court considers in the interest of justice. Cal. Penal Code § 859.1.
- Courtroom closure may also be appropriate where there are no adequate alternatives or the witness's life may

be subjected to a substantial risk.

Florida

- Applies to civil and criminal cases concerning a sex offense
- Child witness must be under 16 years of age
- At the request of the victim or victim advocated, the court shall clear the courtroom of all persons except parties, immediate families or guardians, attorneys and their staffs, court officers and reporters, jurors, and news media. Fla. Stat. Ann. § 918.16

Georgia

- Applies to criminal cases concerning sex offense
- Child witness must be under 16 years of age
- When the child testifies concerning the offense, the court shall clear the courtroom of all persons except parties, immediate families or guardians, attorneys and their staffs, court officers and reporters, jurors, and news media. Ga. Code. Ann. § 17-8-54

Illinois

- In criminal prosecution for sexual crimes enumerated in the statute
- Victim is under 18 years of age
- While victim is testifying
- Court may exclude anyone who, in its opinion, does not have a direct interest in the case, except the media. 725 Ill. Comp. Stat. Ann § 5/115-11

Louisiana

- In cases of sexual crimes enumerated in the statute
- Victim is under 15 years of age
- *Sua Sponte*, or on motion of defendant or State
- Court may hear testimony in chambers or in closed session

- Must be in the presence of judge or jury; defendant, his counsel, and his family; victim's parent(s); State's attorney;
- May include reasonable but limited number of spectators allowed by the court's discretion
- May include any other party the court determines has a valid interest in the proceeding. La. Rev. Stat. Ann. § 15:469.1

Massachusetts
- At a trial for sexual crimes enumerated in the statute (as well as paternity and child-support trials)
- Victim is under 18 years of age
- Presiding justice shall exclude general public from the courtroom except persons having a direct interest in the proceeding. Mass. Gen. Laws Ann. ch. 278 § 16A

Michigan
- During preliminary examinations
- Applies to witnesses, witness testimony
- Court shall consider, among other factors, the age, psychological maturity, and wishes of the victim.
- Court determines on the record that it is necessary to protect the witness by excluding all unnecessary persons from the courtroom
- Transcripts shall be made available for a fee Mich. Comp. Laws Ann. § 600.2163a(9-10)

Minnesota
- At a trial for criminal sexual conduct
- Victim is under 18 years of age
- Judge may exclude public upon a showing, and specifying the reasons therefore, the closure is necessary to protect witness or ensure a fair trial for the duration of the victim testimony or the duration of the trial

- Parties shall have right to object prior to the closure order
- Only persons having direct interest in the case shall be admitted post-closure. Minn. Stat. § 631.045

Montana
- In an action for criminal conversation or seduction
- Court may direct a private trial by excluding all persons except court officers, the parties, their witnesses and counsel. Mont. Code Ann. § 3-1-313

New Hampshire
- Victim is under 16 years of age
- Victim testimony shall be *in camera,* unless good cause shown by defendant
- All evidence and testimony, including that of the victims, shall be available to the public. N.H. Rev. Stat. Ann. § 632-A-8

North Carolina
- At a trial for sexual crimes enumerated in statute
- During testimony of victim, trial judge may exclude all persons except court officers, defendant and those engaged in the trial. N.C. Gen. Stat. § 15-166

South Carolina
- The court must used closed or taped sessions when appropriate for witnesses who are very young, elderly, disabled or have special needs
- The prosecutor or defense attorney must notify the court when any witness or victim deserves special consideration. S.C. Code Ann. § 16-3-1550(E)

South Dakota
- Any portion of criminal proceedings (except grand jury) may be closed

- Where minor testifies concerning sex crime enumerated in statute
- Except to persons having an interest in the proceeding
- After a proper hearing, court may close proceeding to media and parents if it is in the best interests of the minor. S.D. Codified Laws § 23A-24-6

Virginia

- Trial of all criminal cases whether felony or misdemeanor
- Court may in its discretion exclude any persons whose presence would impair a fair trial
- Provided the defendant's right to a public trial is not violated. Va. Code Ann. § 19.2-266

Wisconsin

- When defendant is accused of sexual assault crime enumerated in the statute
- Upon the request of the victim and a finding that there exists a compelling interest such as emotional trauma or undue embarrassment
- Judge may exclude all persons other than court officers, victim's family members, defendant's family members, or others deemed by the court as supportive of them or otherwise required to attend.
- Additional factors that the court may consider in making these findings include, but are not limited to, the complainant's age, psychological maturity and understanding; the nature of the crime; and the desires of the complainant's family. Wis. Stat. Ann. § 970.03(4)